

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

08 CAROLYN L. TURK, )  
09 Plaintiff, ) CASE NO. C10-5513-RAJ  
10 v. ) REPORT AND RECOMMENDATION  
11 MICHAEL J. ASTRUE, Commissioner of )  
Social Security, )  
12 Defendant. )  
13 \_\_\_\_\_ )

14 Plaintiff Carolyn L. Turk appeals the final decision of the Commissioner of the Social  
15 Security Administration (“Commissioner”) which partially denied her application for  
16 Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act, 42 U.S.C.  
17 §§ 401-33 and 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the  
18 reasons set forth below, the Court recommends that the Commissioner’s decision be  
19 REVERSED and REMANDED for an award of benefits.

## I. FACTS AND PROCEDURAL HISTORY

Plaintiff was born in 1955 and was 50 years old on the amended alleged onset date of disability. (Administrative Record (“AR”) 30, 110.) She obtained a General Equivalency

01 Diploma (“GED”). *Id.* Her past work experience includes employment as a care giver and  
02 cashier. (AR 126.) Plaintiff was last gainfully employed on December 21, 2000. (AR 125.)

03 Plaintiff asserts that she is disabled due to depression, anxiety, small-cell lung cancer,  
04 and obesity. (AR 16, 125.) She asserts an onset date of December 1, 2005. (Dkt. 21 at 1-2,  
05 Dkt. 29 at 1.)

06 The Commissioner denied plaintiff’s claim initially and on reconsideration. (AR  
07 71-74, 77-78.) Plaintiff requested a hearing, which took place on January 7, 2009. (AR  
08 25-57.) On February 4, 2009, the ALJ issued a partially favorable decision finding plaintiff  
09 disabled as of September 1, 2007. (AR 14-24.) However, the ALJ found that prior to  
10 September 1, 2007, plaintiff was not disabled based on his determination that plaintiff could  
11 perform other jobs existing in sufficient numbers in the national economy. *Id.*

12 Plaintiff’s administrative appeal of the ALJ’s partially favorable decision was denied by  
13 the Appeals Council (AR 3-5), making the ALJ’s ruling the “final decision” of the  
14 Commissioner as that term is defined by 42 U.S.C. § 405(g). On July 22, 2010, plaintiff timely  
15 filed the present action challenging the Commissioner’s decision. (Dkt. 5.)

## 16 II. JURISDICTION

17 Jurisdiction to review the Commissioner’s decision exists pursuant to 42 U.S.C. §§  
18 405(g) and 1383(c)(3).

## 19 III. DISCUSSION

20 As the claimant, Ms. Turk bears the burden of proving that she is disabled within the  
21 meaning of the Social Security Act (the “Act”). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th  
22 Cir. 1999) (internal citations omitted). The Act defines disability as the “inability to engage in

any substantial gainful activity” due to a physical or mental impairment which has lasted, or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments are of such severity that she is unable to do her previous work, and cannot, considering her age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920. At step one, it must be determined whether a claimant has engaged in substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). The ALJ found plaintiff had not engaged in substantial gainful activity since December 1, 2005, the amended alleged onset date. (AR 16.) At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff had the following severe impairments: depression, anxiety, small-cell lung cancer, and obesity. *Id.* Step three asks whether a claimant’s impairment or combination of impairments meets or medically equals one of the listed impairments in 20 C.F.R. Part 404, Subpt P, App. 1. The ALJ found that prior to September 1, 2007, the date plaintiff became disabled, she did not have an impairment or combination of impairments that met or medically equaled a listed impairment. (AR 17.) If the claimant’s impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (“RFC”) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found that prior to September 1, 2007, plaintiff had the RFC to perform light work

01 with exertional and non-exertional limitations. (AR 19-20.) The ALJ found plaintiff had no  
02 past relevant work. (AR 22.) If the claimant is able to perform her past relevant work, she is  
03 not disabled; if the opposite is true, then the burden shifts to the Commissioner at step five to  
04 show that the claimant can perform other work that exists in significant numbers in the national  
05 economy, taking into consideration the claimant's RFC, age, education, and work experience.  
06 20 C.F.R. §§ 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099-1100. The ALJ found that  
07 prior to September 1, 2007, jobs existed in significant numbers in the national economy that  
08 plaintiff could perform. (AR 22.) The ALJ found that beginning on September 1, 2007, the  
09 severity of plaintiff's small-cell lung cancer met Listing 13.14B. (AR 23.) The ALJ  
10 concluded that plaintiff was not disabled prior to September 1, 2007, but became disabled on  
11 that date and continued to be disabled through the date of the decision. (AR 24.)

12 Plaintiff argues that the ALJ erred in his evaluation of the medical opinion evidence, the  
13 RFC finding, the step five finding, and the credibility determination. (Dkt. 21.) She requests  
14 remand for an award of benefits. *Id.* at 19. The Commissioner agrees the ALJ erred in his  
15 evaluation of the medical opinion evidence, the RFC finding, and, by extension, the step five  
16 finding. (Dkt. 28.) However, the Commissioner does not concede error with the ALJ's  
17 consideration of plaintiff's credibility. He asserts that this case should be reversed and  
18 remanded for payment of benefits after September 1, 2007, but should be remanded for further  
19 administrative proceedings to address the medical evidence for the closed period between  
20 December 1, 2005, and September 1, 2007. *Id.* Plaintiff replies that, even without addressing  
21 credibility, the evidence is sufficient to support a finding of disabled. The only issue before  
22 the Court, therefore, is the proper remedy for the Commissioner's conceded errors.

01           A.     Remedy

02       The Court has discretion to remand a case either for additional evidence and findings, or  
 03 to direct an award of benefits remedy. *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir.  
 04 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)). However, the decision is  
 05 not standardless. The Court may direct an award of benefits where “the record has been fully  
 06 developed and further administrative proceedings would serve no useful purpose.” *Id.* The  
 07 Court may find that this occurs when:

08       (1) the ALJ has failed to provide legally sufficient reasons for rejecting the  
 09 claimant’s evidence; (2) there are no outstanding issues that must be resolved  
 10 before a determination of disability can be made; and (3) it is clear from the record  
 11 that the ALJ would be required to find the claimant disabled if he considered the  
 12 claimant’s evidence.

13       *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that  
 14 erroneously rejected evidence may be credited when all three elements are met).

15       Plaintiff argues there is no reason to remand for further proceedings because the  
 16 evidence is sufficient to support a finding of disabled. Specifically, she contends that the  
 17 medical opinions of examining physician Mark Heilbrunn, M.D., and state agency physicians  
 18 Craig Wingate, M.D., and Alnoor Virji, M.D., which were purportedly adopted by the ALJ,  
 19 indicate that she was limited to sedentary, not light work, and, therefore, she should have been  
 20 found disabled under the Medical-Vocational Guidelines (“guidelines”), 20 C.F.R. pt. 404,  
 21 subpt. P, app 2, Sec. 200.00(d).

22       On April 12, 2006, Dr. Heilbrunn completed a physical examination of the plaintiff.  
 23 (AR 237-41.) He found on examination that she had lumbar and midline tenderness with  
 24 increased lumbar lordosis, right shoulder tenderness which increased with abduction and

01 anterior flexion, decreased back and neck range of motion in forward flexion, and decreased  
02 right shoulder range of motion in all planes. (AR 239-41.) Dr. Heilbrunn diagnosed  
03 plaintiff with degenerative joint disease of the lumbar spine, right shoulder pain consistent with  
04 rotator cuff injury or tendinitis, cervical strain, overweight, and hypertension. *Id.* at 241.

05 On May 1, 2006, Dr. Wingate completed a Physical Residual Functional Capacity  
06 Assessment of the plaintiff. (AR 242-50.) He opined that plaintiff could lift and carry ten  
07 pounds frequently and occasionally and was limited in reaching above her shoulder with her  
08 right arm. (AR 244, 246, 250.) Dr. Virji affirmed Dr. Wingate's opinion on September 14,  
09 2006. (AR 370.)

10 Although the ALJ stated that he assigned "significant weight" to Dr. Heilbrunn's and  
11 Dr. Virji's opinions regarding plaintiff's physical capacity, he failed to incorporate all of the  
12 limitations those doctors identified in his RFC assessment or provide any reasons for rejecting  
13 them. (AR 22.) The ALJ concluded that plaintiff had the ability to perform "light work,"  
14 however, as the Commissioner concedes, "light work" requires "exerting up to 20 pounds of  
15 force occasionally, and/or up to 10 pounds of force frequently to move objects." U.S. Dep't of  
16 Labor, *Dictionary of Occupational Titles* (4th ed. 1991) ("DOT"). No medical opinion in the  
17 record indicates that plaintiff had the ability to exert 20 pounds of force occasionally for lifting  
18 and carrying. Thus, by definition, "light work" is inconsistent with the evidence of record  
19 regarding plaintiff's physical abilities.

20 Although the Commissioner concedes that plaintiff was limited to lifting and carrying  
21 only ten pounds, he argues that this Court should remand this case for further proceedings  
22 because there are unresolved issues. Specifically, he contends that there was no discussion

01 regarding lifting requirements in the ALJ's decision, and that on remand the ALJ should inquire  
 02 whether the jobs identified by the vocational expert ("VE") deviate from the DOT. The Court  
 03 disagrees.

04 As plaintiff points out, the ALJ found that plaintiff was fifty years old on her amended  
 05 alleged onset date of December 1, 2005, and thus was "closely approaching advanced age."  
 06 (AR 22, citing 20 C.F.R. § 416.963.) She had a high school education, and, according to the  
 07 ALJ, had no past relevant work and no transferable job skills. *Id.* If the ALJ had properly  
 08 incorporated the medical source opinions he purportedly accepted, it is clear that plaintiff's  
 09 RFC should actually have been for sedentary, not light work, and she should have been found  
 10 disabled under the guidelines, 20 C.F.R. Pt. 404, Subpt. P, App. 2, Rule 201.12 & 201.14.

11 Thus, when the medical opinions of Drs. Heilbrunn, Wingate, and Virji, are credited as  
 12 true, the Court finds there are no outstanding issues to be resolved and the ALJ would be  
 13 required to find the plaintiff disabled. *See, e.g., Smolen*, 80 F.3d at 1292 (crediting an opinion  
 14 as a matter of law is appropriate when, taking that opinion as true, the evidence in the record  
 15 supports a finding of disability.) Under the guidelines, a person who is fifty years old with a  
 16 high school education will be found disabled when that person is limited to sedentary work and  
 17 has no transferable skills. In this case, *all* examining and non-examining physicians have  
 18 concluded that plaintiff is limited to frequently and occasionally lifting or carrying 10 pounds.  
 19 That there is *no* opinion from any medical source to the contrary was conceded by the  
 20 Commissioner.

21 Accordingly, there are no outstanding issues that must be resolved, and it is also clear  
 22 from the record that the ALJ would be required to find the plaintiff disabled. Because the

01 guidelines direct a finding of “disabled,” there is no need to remand the case for further fact  
02 finding. It is therefore unnecessary for the Court to address plaintiff’s remaining arguments  
03 that additional opinion evidence in the record regarding her mental functional limitations  
04 should also be credited as true, and further support the conclusion that plaintiff is disabled.  
05 Finally, the fact that remand for additional administrative proceedings would pose further delay  
06 also weighs in favor of an award of benefits in this case. *See Varney v. Sec’y Health and*  
07 *Human Servs.*, 859 F.2d 1396, 1398-99 (9th Cir. 1988) (“Delaying the payment of benefits by  
08 requiring multiple administrative proceedings that are duplicative and unnecessary only serves  
09 to cause the applicant further damage – financial, medical, and emotion.”).

10                          IV. CONCLUSION

11                          For the foregoing reasons, the Court recommends that this case be REVERSED and  
12 REMANDED for an award of benefits for the closed period from December 1, 2005, to  
13 September 1, 2007. The ALJ’s finding of disability beginning on September 1, 2007, should  
14 not be disturbed. A proposed order accompanies this Report and Recommendation.

15                          DATED this 1st day of June, 2011.

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18                          Mary Alice Theiler  
19                          United States Magistrate Judge  
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